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No. 06-43

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,

Petitioner,

v.

SCIENTIFIC-ATLANTA, INC. and MOTOROLA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MOTOROLA, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a corporation that made no public statement on which investors relied and had no duty to speak to such investors can nevertheless be found liable in a private action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

2. Whether a private plaintiff can transform a claim against a corporation that allegedly aided and abetted another's fraud into an actionable claim under Section 10(b) of the Securities Exchange Act of 1934 by characterizing it as a "scheme to defraud" in violation of Exchange Act Rules 10b-5(a) and (c).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Motorola, Inc. discloses that it has no parent corporation and that no publicly held company owns more than 10% or more of its stock.

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INTRODUCTION

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) ("*Central Bank*"), this Court interpreted the language in Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) (2000), and held that there was no private right of action for aiding and abetting fraud under that statute. After *Central Bank* was decided, the Securities and Exchange Commission attempted to persuade Congress to amend Section 10(b) to permit civil claims for aiding and abetting. In response, Congress gave the SEC the authority to bring civil actions for alleged aiding and abetting under Section 10(b), but specifically declined to do so as to private plaintiffs. S. Rep. No. 104-98 at 19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 698. In this case, Respondent Motorola, Inc. ("Motorola") is charged with entering into a business transaction with Charter Communications, Inc. ("Charter"), which Charter then fraudulently reported to the public in its financial statements. The United States Court of Appeals for the Eighth Circuit held that the allegations against Motorola constituted, at most, charges of knowingly aiding and abetting Charter and, therefore, were barred under *Central Bank*. As set forth below, this decision was squarely in line with overwhelming precedent interpreting *Central Bank* and defining the boundaries between action that constitutes a primary violation of Section 10(b) and action that constitutes aiding and abetting. Because this case raises no novel issues under *Central Bank* and the courts are not divided in interpreting that decision, the petition here does not meet this Court's standards for review.

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISIONS

Respondent Motorola incorporates by reference Petitioner's statements of the Opinions Below, Jurisdiction, and Statutory and Regulatory Provisions Involved.

STATEMENT OF THE CASE

According to the Complaint filed below,[1] over a period of forty-one months, Charter engaged in a series of fraudulent activities designed to artificially inflate its earnings in nearly two dozen different public financial statements. The only allegations concerning Motorola related to a transaction in the fourth quarter of 2000. According to the Complaint, in the transaction "Charter agreed to pay ... Motorola an additional $20 for each digital converter so long as [Motorola] repaid the same amount to Charter in the form of 'advertising.'" (Complaint ¶ 77.) As a result, the Complaint alleged, Charter "significantly and artificially inflate[d] [its] operating cash flow ... by treating the 'payments' from ... Motorola as 'revenues' when in fact they were simply the return of Charter's own monies." (*Id.* ¶ 78.)

It was undisputed below that it was Charter's public financial statements reflecting Charter's fraudulent accounting decisions that lay at the heart of the claims against Motorola.[2] Petitioner does not dispute the conclusion of the

1. References to "the Complaint" refer to the Amended Consolidated Class Action Complaint filed in this case on August 5, 2003 in the United States District Court for the Eastern District of Missouri.

2. Indeed, the Complaint alleged that Charter was able to accomplish its fraudulent objectives only by lying to its independent auditor, Arthur Andersen. (Complaint ¶ 80.)

Court of Appeals that Motorola "did not issue any misstatement relied on by the investing public, nor [was Motorola] under a duty to Charter investors and analysts to disclose information useful in evaluating Charter's true financial condition." *In re Charter Commc'ns, Inc. Sec. Litig.*, 443 F.3d 987, 992 (8th Cir. 2006) ("*In re Charter*"). Petitioner also does not challenge the findings of the District Court, set forth in the Court of Appeals' decision, that:

> Plaintiffs do not assert that [Motorola] made any statement, omission or action at issue or that plaintiffs relied on any statement, omission or action made by [Motorola]. Plaintiffs do not allege that [Motorola was] responsible for, or [was] involved with the preparation of Charter's allegedly false or misleading financial statements; Charter's allegedly improper internal accounting practices; or the allegedly false or misleading public statements made by Charter and its former executives. Plaintiffs also do not allege that any of the allegedly misleading statements . . . were made, seen or reviewed by [Motorola].

Id. at 991.

The Court of Appeals held that, given those facts, the claims made by Petitioner against Motorola were "nothing more than claims, barred by *Central Bank*, that [Motorola] knowingly aided and abetted the Charter defendants in deceiving the investor plaintiffs." *Id.* at 992. Accordingly, the Court of Appeals affirmed dismissal of the claims against Motorola. *Id.* at 993.

REASONS FOR DENYING THE PETITION

I. Summary of Argument

Under the holding of *Central Bank*, Motorola could only be liable under Section 10(b) in this case if it either (1) made a misstatement on which Charter shareholders relied in connection with the purchase or sale of a security or (2) breached a duty to disclose information to Charter shareholders. Petitioner's claim against Motorola was properly dismissed by the District Court because Motorola neither made a misstatement on which any shareholder of Charter could possibly have relied, nor did it have any duty to communicate any information to Charter shareholders. The Eighth Circuit correctly held that this was a classic charge of aiding and abetting another's fraud – barred under *Central Bank*.

The Eighth Circuit also correctly concluded, in accordance with *Central Bank*, that Petitioner's claim was not saved by characterizing Motorola's alleged conduct as a "scheme to defraud," actionable under subsections (a) or (c) of Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (2006). Contrary to Petitioner's argument, this Court in *Central Bank* was not interpreting paragraph (b) of Rule 10b-5 – the *Central Bank* holding was explicitly based on this Court's reading of the enabling statute, Section 10(b) of the Exchange Act. *See* 511 U.S. at 178 ("Because this case concerns the conduct prohibited by § 10(b), the statute itself resolves the case . . . ."). Because the claim against Motorola failed to meet the "misstatement (or omission)" test of the statute, it cannot be prosecuted by a private plaintiff under Section 10(b) or, therefore, under *any* subparagraph of Rule 10b-5. Any other conclusion would allow a private plaintiff to avoid

Central Bank simply by alleging that conduct constituting aiding and abetting took place in the context of a "scheme to defraud."

As set forth below, the lower courts have consistently and correctly barred claims like those advanced by Petitioner in this case. Thus, the petition for a writ of certiorari should be denied.

II. The Law in This Area Is Not in "Disarray" – Courts Have Consistently Interpreted *Central Bank* to Foreclose Theories of Liability Like Petitioner's

Petitioner attempts to portray the Eighth Circuit's decision in this case as aberrational and contends that the law of aiding and abetting in circumstances similar to those here is in "disarray." Those contentions are inaccurate. To the contrary, the Eighth Circuit's decision was squarely in line with the decisions of this Court and the consistent interpretations of *Central Bank* by Courts of Appeals and District Courts that have considered this issue.

In *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215 (10th Cir. 1996), the U.S. Court of Appeals for the Tenth Circuit held that *Central Bank* precludes liability for secondary actors under Section 10(b) unless they "themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors." *Id.* at 1226.

Similarly, in *Ziemba v. Cascade International, Inc.*, 256 F.3d 1194 (11th Cir. 2001), the Eleventh Circuit rejected the plaintiff's attempt to hold a law firm and accountants liable

as primary violators where none of the alleged misstatements or omissions were attributable to either defendant. *Id.* at 1213.

In *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998), the Second Circuit took the same position, holding that "[i]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement." *Id.* at 175 (internal quotation marks omitted). The court concluded that the plaintiff's attempt to hold an accountant primarily liable under Section 10(b) could not be permitted, reasoning that to do so "in spite of [the accountant's] clearly tangential role in the alleged fraud would effectively revive aiding and abetting liability under a different name, and would therefore run afoul of the Supreme Court's holding in *Central Bank*." *Id.* at 175 (internal quotation marks omitted). The Second Circuit explained that "because § 10(b) and Rule 10b-5 focus on fraud made in connection with the sale or purchase of securities, a defendant must 'know or should know' that *his* representation would be communicated to investors." *Id.* at 175 (emphasis in original).

The Sixth Circuit came to the same conclusion in *Fidel v. Farley*, 392 F.3d 220 (6th Cir. 2004). In that case, a private plaintiff claimed that a company's outside auditor should be primarily liable under Rule 10b-5 for failing to obtain updated financial information from the company prior to the company's issuance of certain offering documents and a registration statement, both of which included unaudited data. *Id.* at 226. The court held that because the defendant auditor had not made any statement in connection with the registration statement or the offering documents, it could not be liable under Section 10(b) or Rule 10b-5: "holding [the auditor] liable for either its alleged implicit endorsement of

the unaudited financial figures or for its failure to insist on a correction to these figures would effectively revive aider and abettor liability in contravention of [*Central Bank*]." *Id.* at 235. In short, because the auditor did not make the misstatement, the Sixth Circuit concluded that it could not be liable under Section 10(b). *Id.*

District Courts in other circuits have followed the same interpretation of *Central Bank*. For example, in *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 235 F. Supp. 2d 549 (S.D. Tex. 2002), the U.S. District Court for the Southern District of Texas held that § 10(b) liability may only be imposed for secondary actors who have created a document containing a misrepresentation upon which investors relied. *Id.* at 692. That court followed the same reasoning in *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 310 F. Supp. 2d 819 (S.D. Tex. 2004), where Merrill Lynch was alleged to have issued "numerous analysts' reports and recommendations containing false and misleading statements about Enron's financial condition, as part of the purported [Enron] Ponzi scheme." *Id.* at 829.[3]

The same interpretation of *Central Bank* controlled the court's decision in *In re Global Crossing, Ltd. Securities Litigation*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004) ("*Global Crossing*"), another case in which a defendant made an actionable public statement. *See id.* at 330-31. The *Global Crossing* court allowed a claim based on a "scheme" theory

3. Unlike the defendants in *Enron*, there is no allegation in the Complaint that Motorola "created a document" containing misrepresentations upon which Petitioner relied in this case. Rather, those misrepresentations were made by Charter and, as noted above, *supra* note 2, only after Charter lied to its independent auditor. (Complaint ¶ 80.)

to proceed against Global Crossing's outside auditor based on allegations that the auditor was the "chief architect and executor" of the alleged scheme at Global Crossing, and that, as auditor, the defendant had issued public statements in the form of the audit opinion. *Id.* at 336. No similar allegations have been, or could have been, made against Motorola in this case.

III. The Eighth Circuit Correctly Applied This Court's Precedent

A. Charter, Not Motorola, Is the Only Potential Defendant Under the Facts Alleged

The Eighth Circuit's decision below was squarely in line with *Central Bank* and the foregoing lower-court holdings. Motorola entered into a transaction with Charter in the fourth quarter of 2000. (Complaint ¶ 7.) Charter lied to its independent auditors about the transaction in order to account for it improperly. (*Id.* ¶ 80.) Charter then issued public statements containing the improper accounting for the Motorola transaction. (*Id.* ¶¶ 78-79, 111-114). Charter's investors then allegedly relied to their detriment on the improper statements made by Charter. (*Id.* ¶¶ 183-184).

As the Court of Appeals made clear, there is no allegation in the Complaint that Motorola had anything to do with this alleged scheme other than entering into the transaction with Charter. *In re Charter*, 443 F.3d at 992-93. There are no allegations that Motorola made any false statement to Charter's investors concerning those agreements; that Motorola participated in any allegedly fraudulent statements made by Charter; or, indeed, that Motorola participated in deciding how Charter would account for the contracts or in

the preparation of the fraudulent financial statements that form the basis of the Complaint. *Id.* at 992. Thus, assuming *arguendo* the truth of Petitioner's allegations against Motorola, the most that Petitioner can prove is that Motorola aided and abetted Charter in Charter's misstatements.

This Court held in *Central Bank* that "[a] plaintiff must show reliance on *the defendant's* misstatement or omission to recover under [Rule] 10b-5." 511 U.S. at 180 (emphasis added). According to allegations in the Complaint, Petitioner relied on Charter's misstatements, and not on any statement by Motorola. (Complaint ¶¶ 7-8, ¶¶ 95-145.) That ends the inquiry. As the Court explained in *Central Bank*, the requirement to prove reliance precludes a Rule 10b-5 claim against someone who did not make the statement in question, but was alleged only to have aided and abetted another's violation:

> Were we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied on the aider and abettor's statements or actions. Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.

511 U.S. at 180 (citation omitted).[4] The Complaint plainly does not allege that any Charter investor relied on any public statement by Motorola.

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4. As the Tenth Circuit explained: "[t]he critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the plaintiff. Reliance only on representations made by others cannot itself form the basis of liability." *Anixter*, 77 F.3d at 1225.

Motorola also had no duty to speak to Charter shareholders. In *Central Bank,* this Court emphasized that "'not every instance of financial unfairness constitutes fraudulent activity under § 10(b).'" 511 U.S. at 174 (quoting *Chiarella v. United States*, 445 U.S. 222, 232 (1980)). Thus, the Court held that what Section 10(b) and Rule 10b-5 "'catch[] must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.'" *Id.* In this case, at most, the claim is that Motorola *by its silence* facilitated Charter's alleged fraud. But, there is no allegation – nor could there be one – that Motorola had any duty to speak to Charter shareholders. Thus, under *Central Bank* and *Chiarella*, Petitioner has no Section 10(b) or Rule 10b-5 claim against Motorola.

B. Petitioner Cannot End-Run *Central Bank* by Alleging that Motorola Violated Rules 10b-5(a) and (c)

Petitioner argues that the claims in the case are predicated on violations of Rule 10b-5(a) and (c), which impose liability for employment of any "scheme or artifice to defraud or fraudulent act or course of business." According to Petitioner, *Central Bank* applies only to alleged violations of Rule 10b-5(b), prohibiting "false statements." Thus, under Petitioner's interpretation, anyone who can be alleged to have participated *in any way* in a "scheme or artifice to defraud" or a fraudulent "act" or "course of business" may be sued by a private litigant under Rule 10b-5 – even if the alleged conduct is aiding and abetting a misstatement, for which a lawsuit would be barred under *Central Bank*. The Eighth Circuit correctly rejected this argument. Indeed, no Court has adopted the expansive reading of Rules 10b-5(a) and (c) that Petitioner espouses here.

The principal problem with Petitioner's argument is that it disregards the express language used by this Court in *Central Bank*. In *Central Bank*, the Court made clear that "[b]ecause this case concerns the conduct prohibited by § 10(b), the statute itself resolves the case. . . ." 511 U.S. at 178; *see also id.* at 173 ("[T]he text of the statute controls our decision."). In other words, a "private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b)." *Id.* at 173.[5] The Court held that "the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation." *Id.* at 177. In other words, this Court in *Central Bank* was not interpreting subsections (a), (b) or (c) of Rule 10b-5 when it held that there was no aiding and abetting liability; the Court was interpreting Section 10(b), the enabling statute. As the Court explicitly held, "[i]t is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text." *Id.*; *see also United States v. O'Hagan*, 521 U.S. 642, 651 (1997) ("Liability under Rule 10b-5 . . . does not extend beyond conduct encompassed by § 10(b)'s prohibition."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) ("[D]espite the broad view of the Rule [10b-5] advanced . . . its scope cannot exceed . . . 10(b).").

Section 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act" in connection with the purchase or sale of a security. *Central Bank*, 511 U.S. at 177. Clearly, Petitioner's Complaint in this case was based on the allegation that

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5. This holding was not the first time the Supreme Court had made this principle clear. *See, e.g., Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1997) ("[T]he language of the statute must control the interpretation of the Rule.").

Charter made fraudulent misstatements in nearly two dozen different public pronouncements made over an approximately forty-one-month period. (Complaint ¶¶ 95-145.) As set forth above, the "misstatement" prong of Section 10(b) provides no basis for a claim against Motorola, since Motorola made no misstatements to Charter investors in connection with the purchase or sale of Charter's securities and had no duty to speak to those shareholders.

The "manipulation" prong of Section 10(b) also does not provide a basis for a claim against Motorola. As the Eighth Circuit correctly held, the term "manipulation" as used in Section 10(b) is, as explained by this Court, "'virtually a term of art when used in connection with securities markets.'" *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1997) (quoting *Ernst & Ernst*, 425 U.S. at 199). Section 10(b) uses the term "manipulation" in a technical sense to "refer[] generally to practices such as wash sales, matched orders or rigged prices, that ... mislead investors by artificially affecting market activity." *Santa Fe Indus.*, 430 U.S. at 476-77. Thus, a claim for "manipulation" requires "practices in the marketplace" which essentially have the effect of "tampering with the price" of securities. *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979); *see also Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005) ("[W]here the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b-5(a) and (c). . . ."); *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 205 (3d Cir. 2001) (explaining that Section 10(b) liability requires either a misstatement or, under the "manipulation" prong, the creation of "a false impression of market activity"). The acts alleged by Petitioner in the Complaint against Motorola do not constitute "manipulation" as that term is used in Section 10(b).

What this means is that there is no basis in this case to argue that the alleged conduct in issue here by Motorola – which is aiding and abetting that cannot violate Section 10(b) – can nevertheless be an actionable violation of subparagraphs (a) and (c) of Rule 10b-5 as an alleged "scheme to defraud." To accept this argument would both disregard and eviscerate *Central Bank*. Thus, the attempt by Petitioner to create broad liability for any "scheme to defraud" was correctly rejected by the Eighth Circuit.[6]

Contrary to Petitioner's assertion, that conclusion is also consistent with this Court's decision in *SEC v. Zandford*, 535 U.S. 813 (2002). That case involved a claim against a broker who sold securities to the plaintiff with the intention of misappropriating the proceeds. Petitioner asserts that *Zandford* allows a claim to proceed based on a "scheme to defraud" without the need for a misstatement. But Petitioner glosses over the holding in that case – that "any distinction between omissions and misrepresentations is illusory *in the context of a broker who has a fiduciary duty* to her clients." *Id.* at 823 (emphasis added). Unlike Motorola, the broker defendant in *Zandford* had a duty to inform the plaintiff of material information, and the failure of that broker to do so constituted an actionable material omission in connection with the purchase of a security – a quintessential violation

6. *See also In re Dynegy Sec. Litig.*, 339 F. Supp. 2d 804, 916 (S.D. Tex. 2004) ("Under *Central Bank* the aid that Citigroup provided Dynegy [in structuring misreported transactions] is not actionable under § 10(b), and plaintiffs cannot invoke subsections (a) and (c) of Rule 10b-5 to circumvent *Central Bank*'s limitations on liability for secondary actor's involvement in the preparation of false and misleading statements."); *Wenneman v. Brown*, 49 F. Supp. 2d 1283, 1288 (D. Utah 1999) ("*Central Bank* applies with equal force to subsections (a), (b), and (c) of Rule 10b-5").

of Section 10(b). *Zandford* was thus consistent with both *Central Bank* and *Chiarella* in that silence by a secondary actor is actionable under Section 10(b) where the secondary actor is under a duty to speak. It is undisputed that Motorola had no such duty to Charter's shareholders.

C. The Ninth Circuit's Recent Decision in *Simpson v. AOL Time Warner* Does Not Provide Grounds to Grant the Writ

Contrary to Petitioner's suggestion in its Supplemental Brief, the Ninth Circuit's decision in *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040 (9th Cir. 2006) ("*AOL Time Warner*"), has created no conflict of authority in the courts of appeals. In *AOL Time Warner*, plaintiff shareholders alleged that Homestore.com, an internet company, committed securities fraud by overstating reported revenues, 452 F.3d at 1042. They alleged that various third-party vendors participated in that fraud by entering into "sham transactions" with Homestore.com. *Id.* The District Court dismissed the complaint in reliance on *Central Bank*, *id.*, and the Ninth Circuit *affirmed* in relevant part, *id.* at 1054 ("Because the [complaint] does not allege a valid claim for primary liability under any theory of liability, the district court properly dismissed the claims in the [complaint] against the Defendants.").[7] *Relying on the Eighth Circuit's opinion in the present case*, the Ninth Circuit in *AOL Time Warner* explained that participation in a transaction that does not itself deceive anybody cannot give rise to "a primary violation even if the defendant knew or intended that another party would manipulate the transaction to effectuate a fraud.

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7. The Ninth Circuit remanded the case, however, holding that the plaintiffs should have an opportunity to replead. 452 F.3d at 1055.

See In re Charter Commc'ns, Inc., Sec. Litig., 443 F.3d 987, 992 (8th Cir. 2006)." *AOL Time Warner*, 452 F.3d at 1050. The Ninth Circuit held that primary liability under Section 10(b) "requires more than assertions of 'helping' or 'assisting' another's deception," and concluded that the plaintiffs' allegations of sham transactions amounted to, at most, aiding and abetting. *Id.* at 1052.

Contrary to Petitioner's assertion, the Ninth Circuit's comments in *AOL Time Warner* are not a proper basis for a writ of certiorari. Petitioner's argument relies upon language in that opinion that was unnecessary to the Ninth Circuit's disposition of the case. After affirming the District Court's holding, the Ninth Circuit went on to posit that a plaintiff could meet the requirements of Section 10(b) by alleging that a defendant "engaged in a deceptive act," which it defined as an act undertaken with "the purpose and effect of creating a false appearance." *Id.* at 1052. By definition, these statements were dicta.

Supreme Court Rule 10(a) provides that, in exercising its judicial discretion to grant or deny a petition for a writ of certiorari, the Court considers whether "a United States court of appeals has entered a *decision* in conflict with *the decision* of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a) (2005) (emphases added). Although Rule 10(a) does not control or limit this Court's discretion, *id.*, it reflects the fundamental premise that this Court sits in review of judgments and not "statements in opinions," *California v. Rooney*, 483 U.S. 307, 311 (1987), or "to correct errors in dicta," *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J. dissenting); *see also Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923) ("[I]t is very important that we be consistent in not

granting the writ of certiorari except ... in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."). The Ninth Circuit's decision does not conflict with that of the Eighth Circuit or with those of any other court discussed *supra*. Its dicta are not grounds to grant the writ.

Moreover, certain aspects of the Ninth Circuit's opinion in *AOL Time Warner* suggest that there may be no real difference in its application of *Central Bank* from that employed in its sister circuits, including the Eighth Circuit here. The Ninth Circuit's putative requirement of a "purpose and effect of creating a false appearance," *see AOL Time Warner*, 452 F.3d at 1050; its reliance on the Eighth Circuit's reasoning in this case, *id.* (citing *In re Charter Commc'ns*, 443 F.3d at 992); and its holding that the plaintiffs had failed to state a claim on which relief could be granted, all suggest that, like the Eighth and other circuits, the Ninth Circuit would require allegations of some communicative or otherwise public fraudulent act in order to state a claim under Section 10(b) of the Exchange Act.

Thus, *AOL Time Warner* may present no conflict among the circuits. What ultimate position the Ninth Circuit may take in the *AOL Time Warner* litigation will depend on a variety of factors (*e.g.*, how plaintiffs replead and what the District Court decides if a motion to dismiss is filed) which can be reviewed by this Court, if necessary, if and when the *AOL Time Warner* case itself presents issues worthy of review. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 516 n. 11 (1988) (finding "no reason to address" a Court of Appeals' "additional comments" that "were pure dictum"); *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 78 n.2 (1955) (citing instances of dismissal of certiorari where

"an asserted conflict turned out to be illusory"). On the other hand, if this Court views the Ninth Circuit's comments in *AOL Time Warner* as a true departure from *Central Bank*, the most direct and effective way to address that error would be on writ of certiorari to the Ninth Circuit.

* * *

Motorola respectfully submits that what Petitioner is really trying to do here is ask the Court to disregard *Central Bank* and its progeny. There is no reason given for this in the Petition and no argument as to why *Central Bank* was wrongly decided. In fact, Petitioner also disregards the fact that, as noted above, after *Central Bank* was decided, the SEC attempted to persuade Congress (in the context of consideration of what became the Private Securities Litigation Reform Act of 1995) to amend Section 10(b) to permit private claims for aiding and abetting. The SEC argued that Congress should "fully restore the aiding and abetting liability eliminated in the Supreme Court's Central Bank of Denver opinion." S. Rep. No. 104-98, at 48, *reprinted in* 1995 U.S.C.C.A.N. 679, 727. Although Congress decided to give the SEC authority to bring civil actions for alleged aiding and abetting, it specifically declined to do so as to private plaintiffs because "private aiding and abetting liability actions under [§] 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation." S. Rep. No. 104-98, at 19, *reprinted in* 1995 U.S.C.C.A.N. 679, 698.

This is a classic case of alleged aiding and abetting. There is no private cause of action for this kind of alleged conduct. The Eighth Circuit saw the claim for what it was and properly dismissed it under *Central Bank*.

CONCLUSION

For the foregoing reasons, Motorola respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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